Supreme Court, U.S.
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No. 95-1191

In The

Supreme Court of the United States

October Term, 1995

JACK F. TRAHAN,

Petitioner,

v.

EMMA J. TRAHAN,

Respondent.

On Petition For A Writ Of Certiorari To The Texas Court Of Appeals, Third District, At Austin

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED BY PETITIONER

Whether the state court's refusal to apply 10 U.S.C. Sec. 1408(c)(1) to suspend a state judgment dividing military retired pay violates the Supremacy Clause of the United States Constitution?

LIST OF PARTIES

The caption of the case in this Court contains the names of the parties.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED BY PETITIONER	i
LIST OF PARTIES	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
OPINION BELOW	1
CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE	1
STATEMENT OF THE CASE	1
REASONS FOR DENYING THE WRIT	2
CONCLUSION	8

TABLE OF AUTHORITIES

Page

CASES:

In re Burrus, 136 U.S. 586 (1890) 7

Fleming v. Rhodes, 331 U.S. 100 (1947) 4, 5

Free v. Bland, 363 U.S. 663 (1962) 3

Frisbie v. U.S., 157 U.S. 160 (1895) 3

Hisquierdo v. Hisquierdo, 439 U.S. 572 (1979) 4, 7

Lynch v. U.S., 292 U.S. 571 (1934) 3

Mansell v. Mansell, 490 U.S. 581 (1989) 4

McCullough v. Virginia, 172 U.S. 102 (1898) 3

Ridgway v. Ridgway, 454 U.S. 46 (1981) 3

State Farm Mut. Automobile Ins. Co. v. Duel, 324 U.S. 154 (1945) 5

Trahan v. Trahan, 894 S.W.2d 113 (Texas Court of Appeals – Austin 1995, writ denied) 1, 2

United States v. Larionoff, 431 U.S. 864 (1977) 4

United States v. Teller, 107 U.S. 64 (1883) 3

United States v. Yazell, 382 U.S. 341 (1966) 7

Wissner v. Wissner, 338 U.S. 655 (1950) 3

Ziccardi's Case, 192 N.E.29 (Mass.S.Ct. 1934), cert. denied, *Ziccardi v. Traveler's Ins. Co.*, 294 U.S. 716, reh'g denied, 294 U.S. 733 (1935) 3

TABLE OF AUTHORITIES – Continued

Page

CONSTITUTION, STATUTES, REGULATIONS AND RULES:

United States Constitution, Amendment V..... 1

10 U.S.C. Sec. 1408(c)(1) 1, 7

Supreme Court Rule 10..... 5

OTHER:

16A Corpus Juris Secundum, Constitutional Law Sec. 393 3

OPINION BELOW

The opinion of the Texas Court of Appeals, Third District, at Austin (App. A-1 to the Petition), is reported at 894 S.W.2d 113. The denial of review by the Texas Supreme Court (App. A-18 to the Petition) and the refusal of rehearing by the Texas Supreme Court (App. A-19 to the Petition) were without opinion.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED IN THE CASE

In addition to the constitutional provisions and statutes cited by Petitioner, the case involves the following:

United States Constitution, Amendment V

> No person shall . . . be deprived of life, liberty, or property, without due process of law. . . .

10 U.S.C. Sec. 1408(c)(1).

> (1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such Court.

STATEMENT OF THE CASE

As set forth in the Petition, Petitioner and Respondent were divorced in 1965. The Divorce Decree made no

mention or disposition of Petitioner's military retired pay.

In 1982, Respondent "reopened" the Decree in a partition action, and recovered a portion of Petitioner's military retired pay in the Texas Court.

In 1993, Respondent obtained a Declaratory Judgment in the Texas Court that he was no longer obligated to make payment, by virtue of the 1990 Amendment to the Uniformed Services Former Spouse's Protection Act.

In 1995, the Texas Court of Appeals reversed the Declaratory Judgment, holding that (1) the doctrine of res judicata barred reopening the 1983 judgment regardless of the 1990 Amendment, and (2) the Trial Court's retroactive application of the 1990 Amendment to a valid judgment of a Texas Court is unconstitutional under the Due Process Clause of the United States Constitution. See opinion below, 894 S.W.2d at 113, 119.

REASONS FOR DENYING THE WRIT

I. The Texas Court correctly held that the 1990 Amendment is unconstitutional as applied to cut off Respondent's right to military retired pay affirmatively granted in a prior state court judgment.

The 1990 Amendment may not be constitutionally applied to deprive Respondent of rights vested in the Respondent by the 1983 Judgment. That Judgment is valid and subsisting, and it is res judicata of Respondent's rights in this case.

"As a general rule, retrospective laws are unconstitutional if they disturb or destroy existing or vested rights, as where they disturb or destroy existing or vested rights embodied in judgments or judicial decisions." 16A C.J.S., Constitutional Law Sec. 393, citing *Ziccardi's Case*, 192 N.E.29 (Mass.S.Ct., 1934), cert. denied, *Ziccardi v. Traveler's Ins. Co.*, 294 U.S. 716 (1935), reh'g denied 294 U.S. 733 (1935).

In *McCullough v. Virginia*, 172 U.S. 102, 125-125 (1898), this Court held as follows:

> It is not within the power of a legislature to take away rights which have been once vested by a judgment. Legislation may act on subsequent proceedings, may abate actions pending, but when those actions have passed into judgment, the power of the legislature to disturb the rights created thereby ceases.

Petitioner argues that "under the Supremacy Clause, all state law is preempted in the matter of military retired pay, except to the degree Congress has expressly permitted state law implication." In support of this proposition, Petitioner cites *Ridgway v. Ridgway*, 454 U.S. 46, 54 (1981); *United States v. Teller*, 107 U.S. 64, 68 (1883); *Frisbie v. U.S.*, 157 U.S. 160, 166 (1895); *Lynch v. U.S.*, 292 U.S. 571, 577 (1934); *Free v. Bland*, 363 U.S. 663 (1962); and *Wissner v. Wissner*, 338 U.S. 655 (1950).

However, **none** of the foregoing cases involved the doctrine of res judicata protection of rights affirmatively granted in a previous judgment. Moreover, *Ridgway v. Ridgway*, upon which Petitioner relies heavily, rested partially on this Court's conclusion that the serviceman's right there in question is ". . . personal to the member

alone. It is not a shared asset subject to the interest of another, as is community property." *Id.* at p. 60.

Moreover, in at least one case, *United States v. Larionoff*, 431 U.S. 864 (1977), this Court refused to give retroactive effect to a Congressional enactment repealing a special reenlistment bonus for service members. Although not a res judicata case, the decision was grounded on the proposition that the serviceman had a protected property interest in the bonus "for services already performed, but still owing." *Id.* at 879.

In *Mansell v. Mansell*, 490 U.S. 581 (1989), this Court dealt specifically with the issue of res judicata as it applied to the Uniformed Services Former Spouse's Protection Act. After examining the legislative intent and the precise language of the Act, this Court noted as follows:

> Whether the doctrine of res judicata . . . should have barred the reopening of pre-McCarty settlements is a matter of state law over which we have no jurisdiction.

Id. 490 U.S. at 586 at n.5.

Although Petitioner correctly states that the 1983 version of the statute addressed in *Mansell v. Mansell* did not have any provision for retroactive application, the primary basis of the footnote is in the long-standing policy of this Court in deferring to state law in the field of domestic relations. *Mansell v. Mansell, supra; Hisquierdo v. Hisquierdo*, 439 U.S. 572 (1979).

Petitioner cites *Fleming v. Rhodes*, 331 U.S. 100 (1947) for the proposition that a prior state court judgment establishing private rights cannot prevent the effect of

subsequent Congressional legislation. The question in *Fleming v. Rhodes* was whether a subsequent change in federal law could be used as the basis for an injunction against evictions under state court judgments. It is clear from the opinion, however, that this Court defined the question therein as one of enjoining "future proceedings." This Court specifically observed, "It is immaterial whether the state judgments [for eviction] were obtained before or after the effective date of the [subsequent federal legislation]." *Fleming v. Rhodes* at 106-7.

The eviction "rights" did not amount to "vested rights." The ultimate issue in the case was **possession** of the leased premises, which the landlords had not yet obtained. (Presumably, the enjoining court must have issued its injunction before the writ of possession was issued by the evicting court.) Had the landlords obtained possession, it is probable that their possession would have been viewed as a vested right; and the result of the case would have been different. In effect, the case remained pending until and unless the landlords obtained possession. It is well settled that the doctrine of res judicata does not apply to a final judgment when the law has changed during the appeal of the case. *State Farm Mut. Automobile Ins. Co. v. Duel,* 324 U.S. 154 (1945).

II. There are no compelling reasons to grant the Writ.

There are no "compelling reasons" to grant the Writ, as required by Supreme Court Rule 10.

Petitioner incorrectly argues that a great many military retirees would be adversely affected by the Texas

Court decision. To the contrary, the class of persons represented by Petitioner and Respondent is finite and not significant in number. It includes only those cases in which a former spouse was affirmatively granted an interest in military retired pay prior to the date of the 1990 Amendment, and then **only** those cases where the divorce occurred prior to June 25, 1981. A growing portion of these former spouses, like Respondent, are approaching the end of their lives.

The decision below is consistent with the policy of the 1990 Amendment, in that it does not allow the "reopening" of any cases in which an affirmative right to retired pay was not previously adjudicated. It is ironic that in the instant case, Respondent's 1983 Texas Judgment constituted a "reopening" of her 1965 Divorce Decree. The Texas trial court, by erroneously applying the 1990 Amendment to this situation, in effect permitted a "reopening" of a "reopening." Instead of carrying out the 1990 Amendment's purpose of leaving settled rights in place, the Texas trial court (prior to reversal by the Texas Court of Appeals) again stirred up controversy, and overturned settled rights.

Petitioner cites two decisions from the California Courts of Appeal which applied the 1990 Amendment to bar pension rights previously adjudicated in favor of former spouses. He mistakenly suggests that this difference in treatment is a "compelling reason" to grant the Writ. His argument ignores the fundamental operative provision of the Uniform Services Former Spouse's Protection Act, which allows state courts to deal with military retired pay **in accordance with state law**:

> (1) Subject to the limitations of this section, a court may treat disposable retired or retainer pay payable to a member for pay periods beginning after June 25, 1981, either as property solely of the member or as property of the member and his spouse in accordance with the law of the jurisdiction of such Court.

10 U.S.C. Sec. 1408(c).

This Court has long followed a policy of deferring to state law in the domestic relations field:

> The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.

In re Burrus, 136 U.S. 586, 593-594 (1890).

The Court has more than once stated that "(s)tate family and family-property law must do 'major damage' to 'clear and substantial' federal interests before the Supremacy Clause will demand that state law be overridden. *United States v. Yazell*, 382 U.S. 341, 352 (1966)." *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 581 (1979).

No compelling reason exists for this Court to depart from its long standing policy in this case.

CONCLUSION

The Writ of Certiorari should be denied.

Respectfully submitted,

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